(33,569)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 260

IVY L. LEONARD AND THOMAS B. LEONARD, COPARTNERS, TRADING AS I. L. LEONARD & COMPANY, PLAINTIFFS IN ERROR AND APPELLANTS,

vs.

SWEPSON EARLE, CONSERVATION COMMISSIONER OF MARYLAND AND HEAD OF THE CONSERVATION DEPARTMENT OF THE STATE OF MARYLAND

IN ERROR TO AND APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

INDEX

	Original	Print
Proceedings in court of appeals of Maryland	1	1
Caption (omitted in printing)	3	
Record from Baltimore City court	3	1
Petition for mandamus	4	1
Exhibit No. 1—Application and correspondence	19	16
No. 2—Application	21	18
No. 3—Agreement	23	19
Order to show cause	26	21
Docket entries	26	22
Answer	26	22
Demurrer to answer	30	26
Docket entries	31	27
Colloquy between court and counsel	32	27
Memorandum opinion	33	29

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 9, 1928

	Original	Print
Order dismissing petition	40	35
Docket entry of judgment	40	36
Order of appeal	40	36
Clerk's certificate (omitted in printing)	41	
Opinion, Bond, J	42	37
Judgment	53	47
Cost bill (omitted in printing)	54	
Petition for writ of error and/or appeal	55	47
Assignments of error	61	52
Order allowing writ of error and/or appeal	65	55
Bond on writ of error (omitted in printing)	67	
Writ of error	69	56
Citation and service (omitted in printing)	72	
Stipulation re transcript of record	75	57
Clerk's certificate (omitted in printing)	77	
Statement of points to be relied upon and stipulation to print entire record	78	58

[fols. 1-3] **IN BALTIMORE CITY COURT**

Ivy L. Leonard and Thomas B. Leonard, Copartners, Trading as I. L. Leonard and Company,

vs.

Swepson Earle, Conservation Commissioner of Maryland and Head of the Conservation Department of the State of Maryland

[fol. 4] Petition for Writ of Mandamus—Filed Sept. 28, 1927

To the Honorable the Judge of the Baltimore City Court:

The petition of Ivy L. Leonard and Thomas B. Leonard, co-partners trading as I. L. Leonard and Company, respectfully represents:

1. That your petitioners, Ivy L. Leonard and Thomas B. Leonard, are both adults, residing in the City of Cambridge, in Dorchester County, in the State of Maryland, and that they are both citizens and residents of said City, County and State, that they are co-partners, and that they trade and are engaged in business in said City, County and State, under the firm name of I. L. Leonard and Company, and that they have been engaged in the business of packing oysters for several years last past, and they desire and intend to pack oysters at said City, County and State during the oyster packing season, beginning September 1, 1927, and ending on the 25th day of April, 1928.

2. That your Petitioners own in fee simple, a lot of land with buildings and improvements thereon, and with proper equipment for packing oysters, located in said City, County and State, which property is of the value of several thousand dollars, upon which property your Petitioners now pay, and for several years last past have paid, city taxes to the City of Cambridge, county taxes to Dorchester County, and state taxes to the State of Maryland, and if they are prevented from using the said property for the packing of oysters during the said season, they will suffer irreparable loss, injury and damage, of a nature, kind and

extent that cannot be certainly determined, so that the same might be recovered in any action at law, because the amount of the said business they would do is impossible to be accurately estimated, so as to be sufficiently definite to be recovered at law, therefore, if they are prevented from using the said property for the said purpose during the said season, their injury, damage and loss will be irreparable.

3. That during the oyster packing season of 1926, at their said place of business, and using the said property, they packed 50,800 bushels of oysters and in the oyster packing seasons of 1925 and 1926, they packed 52,714 bushels of oysters, that in each of said years, about ten per cent. of the oysters backed by them, were oysters that they bought [fol. 5] outside of the State of Maryland, or about ten per cent. of all the oysters used and packed by your petitioners do not come from the waters or the natural oyster bottoms of the State of Maryland, but are from the waters and oyster bottoms of other states, and that during the said oyster packing season of 1926 and 1927, at least ten per cent. of their total pack were oysters from other states than the State of Maryland, that in addition to the said oysters from other states than Maryland, your petitioners during the said packing season of 1927 and 1928, would use oysters from rented or leased bottoms in the State of Maryland, that is, they would use about ten per cent. of oysters from other states than Maryland, and in addition would use and pack oysters from leased bottoms in the State of Maryland, as well as oysters from the natural oyster rocks of the State of Maryland.

That your Petitioners are informed, and they therefore allege, that there are during each year, shucked and packed in the State of Maryland, by various persons, firms and corporations, engaged in the packing of oysters, large quantities of oysters from other States, particularly from the States of Virginia and New Jersey, and that in certain sections of the State of Maryland, particularly in Somerset County, Maryland, the quantity of oysters from the State of Virginia shucked and packed by packers and canners in said section and county, approximates fifty per cent. of all the oysters shucked and packed therein.

4. That your Petitioners, in preparation for their engaging in the packing of oysters from September 1, 1927, to

April 25, 1928, on the 30th day of August, 1927, filed with the Defendant, an application for a license to pack oysters, your Petitioners having but one place for said business, or having but one house in which they engage in said business, which is the property hereinbefore mentioned, which application was accompanied by the check of your petitioners for Twenty-five (25) Dollars, to pay for the said license, which said application, together with the said check, was refused by the Defendant, because the application was not in the form prescribed by the Conservation Department, as set forth in the letter of the Defendant, refusing the said application.

[fol. 6] The original of said application, together with the check accompanying the same and the letter of the Defendant refusing the application, is herewith filed as part hereof, marked "Petitioner's Exhibit 1."

5. That by the Acts of the General Assembly of Maryland, 1922, Chapter 29, and 1916, Chapter 682, the same being Section 1 of Article 19A of the Code of Public General Laws of Maryland, 1924 (Bagby's), a Conservation Department of the State of Maryland was created and established and that the head of the said Department should be the Conservation Commissioner, that Swepson Earle, Esq., has been duly appointed and has fully qualified as the head of the said Conservation Department and is the Conservation Commissioner under the provisions of the said Article of the Code of Public General Laws of Maryland.

6. That by Section 91 of Article 72 of the Code of Public General Laws of Maryland, 1924 (Bagby's), title "Oysters," sub-title "Packing Oysters," it was provided:

"It shall be unlawful for any person, firm or corporation having a fixed place of business, buying oysters and employing labor to prepare them for market to engage in the business of buying, selling, marketing, packing or canning oysters without first taking out a license to engage in such business by application to the clerk of the Circuit Court for the county in which the place of business of such applicant may be situated, or to the clerk of the Court of Common Pleas, if the place of business of such applicant shall be in Baltimore City; and such applicant, at the time such license is issued to him by the said clerk shall pay

to said clerk the sum of twenty-five dollars for such license, and said license shall have effect from the first day of September, in the year in which it may have been obtained, to the twenty-fifth day of April, inclusive, next succeeding; and all said moneys received for said license shall be paid over and accounted for by the several clerks of the Courts to the Comptroller of the State, to be placed to the credit of the Conservation fund, as provided by Section 33 of this Article. Where any such person, firm or corporation, operates more than one house for the buying, selling, marketing, packing or canning of oysters, a separate license shall [fol. 7] be obtained for each house in which oysters are shucked or otherwise prepared for market."

7. That by an Act of the General Assembly of Maryland, 1927, Chapter 119, by Section 1 of said Act, the aforesaid Section 91 of Article 72 of the Code of Public General Laws of Maryland, title "Oysters," sub-title "Packing Oysters," providing for licensing of oyster packers was repealed and re-enacted with amendments, to read as follows:

"Whereas, the demand for oysters is constantly increasing and the oyster bars and rocks of Chesapeake Bay and its tributaries are showing such great depletion that constructive legislation is necessary to preserve and rehabilitate such depleted areas, and

"Whereas, a Seafood Committee, consisting of representatives from each tidewater county, was appointed by Governor Albert C. Ritchie, to investigate and recommend remedial legislation to increase the oyster supply of Maryland, among which was the recommendation that the State should reserve ten per cent. of all shells made by the oyster packing houses to be planted upon reserved and seed areas; therefore:

Section 1. Be It Enacted by the General Assembly of Maryland, That Section 91 of Article 72 of the Code of Public General Laws of Maryland, title "Oysters," sub-title "Packing Oysters," providing for licensing of oyster packers be and is hereby repealed and re-enacted with amendments, to read as follows:

91. It shall be unlawful for any person, firm or corporation having a fixed place of business, buying oysters and

employing labor to prepare them for market to engage in the business of buying, selling, marketing, packing or canning oysters without first taking out a license to engage in such business by application to the Conservation Department of Maryland. Where any such person, firm or corporation operates more than one house for the buying, selling, marketing, packing or canning of oysters, a separate license shall be obtained for each house in which oysters are shucked or otherwise prepared for market: such license to be in the nature and form of a contract between the [fol. 8] State of Maryland and the applicant and shall provide for the payment of a license fee of twenty-five dollars, and shall further provide that the licensee must turn over to the State of Maryland at least ten per cent. of the shells from the oysters shucked in his establishment for the current season, said shells to be removed on or before the twentieth day of August of said season; or at the discretion of the Conservation Department its equivalent in money, the value thereof being determined at the market value of shells as of the first day of May following the close of the season. The Conservation Department shall notify each packer or canner on or before the said first day of May whether it is its intention to take the ten per centum of the shells from oysters shucked as aforesaid, or its equivalent in money. Said license shall have effect from the first day of September in the year in which it may have been obtained until the twenty-fifth day of April, inclusive, next succeeding.

Sec. 2. And Be It Further Enacted, That a new section to be known as 91-A be added to Article 72 of the Code of Public General Laws of Maryland, title "Oysters," to follow immediately after Section 91 of said Article, be and is hereby added to read as follows:

91-A. All moneys derived from said license fee of twenty-five dollars shall be paid over to the Comptroller to be credited to the Conservation Fund, and one-half of the shells received by the Conservation Department shall be transplanted upon such natural beds or bars as may be reserved by the Conservation Commissioner as provided for elsewhere in this Article, and the other one-half of said shells shall be planted on such seed areas as may be set

aside by the Conservation Commissioner for seed oysters. In case money is paid in lieu of the ten per cent. of shells, the Conservation Commissioner shall convert same into shells or seed oysters to be transplanted in like manner.

Sec. 3. And Be It Further Enacted, That all laws or parts of laws of the State of Maryland, general or local, inconsistent with the provisions of this Act be and the same are hereby repealed to the extent of such inconsistency.

[fol. 9] Sec. 4. And be it further enacted, That this Act shall take effect June 1st, 1927."

8. That the said Act of 1927 embraces two subjects, one subject providing for the issuing of license for the packing of oysters, in which the aforesaid Section 91 of Article 72 of the Code of 1924 is entirely re-enacted, except that the Conservation Department of Maryland shall issue the licenses under the new Act, whereas, under the old Section, the license was issued by the Clerk of the respective counties of Maryland, or the Clerk of the Court of Common Pleas of Baltimore City, the only change made in the new Act on the subject of license, being changing the place of issue from the said Clerks of Court to the Conservation Department.

9. The other or second subject in the new Act of 1927, is a provision that the license to pack oysters shall be in the nature and form of a contract between the State of Maryland and the applicant, and that it should provide that the licensee must turn over to the State of Maryland at least ten per cent of the shells from the oysters shucked in his establishment for the current season, said shells to be removed on or before the 20th day of August of said season, or in the discretion of the Conservation Department, its equivalent in money, the value thereof being determined at the market value of shells as of the first day of May following the close of the season, the Conservation Department to notify each packer or canner on or before the said 1st day of May, whether it is its intention to take the ten per cent of the shells from oysters shucked, as aforesaid, or its equivalent in money.

10. That whereas the said Act of 1927, declares the license to pack oysters to be in the nature and form of

a contract between the State of Maryland and the applicant, yet no person or department of the State is by said Act or by law of the State, designated, empowered or authorized to execute any such contract.

11. That the said Act declared that at least ten per cent of the shells from the oysters shucked in the establishment of the licensee for the season for which license is issued, shall be turned over to the State of Maryland, which would [fol. 10] apply to shells from oysters from the natural oyster rocks of Maryland and also shells from oysters from other states, and not from Maryland, and also to shells from oysters from oyster bottom leased by the State of Maryland, to oyster planters, the said provision as to shells not only applying to Maryland natural rock oysters, but to shells from oysters from all other places other than the Maryland natural oyster rocks.

12. That your Petitioners deny that the State of Maryland can legally take or require of them to turn over to the State, the shells from oysters that they buy from out of the State of Maryland or to oysters that they buy from planters of oysters on and from oyster bottom leased by the State of Maryland, and they further deny that the State of Maryland can compel them or legally require them to turn over to it shells from oysters from the natural oyster rocks of Maryland, because in reference to the last named oysters, the catcher of the oysters is permitted to sell them outright, without any reservation by the State as to shells, so that the said oysters from the natural oyster rocks of Maryland, when purchased by your Petitioners, become their own private and individual personal property, and that as to oysters they buy from out of Maryland, and leased bottoms in the State, the State never had any right or claim to them at all.

13. Your Petitioners therefore allege, that the said provision of the said Act of 1927, as to the oyster shells required to be turned over to the State or, in the discretion of the Conservation Commissioner, money in lieu of shells, is in violation of the following provisions of the Constitution of the United States and of the Constitution of the State of Maryland, to wit:

A. Article 14, of the Constitution of the United States:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

The said Act of 1927, in imposing upon oyster packers the burden of a contribution of shells or money, first, classifies oyster packers from all other persons engaged in the [fol. 11] oyster business, and picks them out and sets them apart as a class of citizens upon whom is imposed this burden, thereby denying to them, as citizens, the privileges and immunities that are still enjoyed by other persons in the said business, because the catcher of oysters and all persons who buy or handle them until they are shucked, have them as their absolute property, but, when they pass to the packer who shucks them, this burden is imposed upon the packers, which is an abridgement of their privileges and immunities as citizens of the United States.

(1) "Nor shall any state deprive any person of life, liberty or property without due process of law."

Inasmuch as the Statute declares that, in the discretion of the Conservation Commissioner, money shall be given by the packer in lieu of shells, and the amount shall be fixed at the market price on the 1st day of May, when, as a matter of law, the meaning of the expression "Market Price," is a price fixed by the buyer and seller in an open market, in the usual and ordinary course of lawful trade and competition, the price or value of the articles established or shown by sales, public or private in the ordinary way of business, or the fair value of the property as between one who desires to purchase and one who desires to sell, the current value.

This act, therefore, leaves out of consideration and takes no consideration of the desire or wish of the packer to sell, but arbitrarily compels him to sell, which is a direct opposite of due process of law.

(2) "Nor deny to any person within its jurisdiction the equal protection of the law."

Under the Act of 1927, the catcher, or buyer from the catcher, or any person who handles oysters except a packer,

can sell the oysters out of the State of Maryland, and the condition of rendering shells or money in lieu of shells does not apply or affect or touch such person at all, therefore, this act discriminates in favor of citizens and people of other states against citizens or people of the State of Maryland, and denies to the packers, as a class, the equal protection of the law, but imposes upon them a burden which is [fol. 12] not imposed upon any other persons who handle oysters, and which is imposed upon Maryland packers, but does not touch a foreign packer or packer out of the State.

B. Article 1, Section 10, Constitution of the United States:

"No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

The Act of 1927, by compelling a packer to give ten per cent of shells or money in lieu of shells, applies to oysters brought from, and brought into the State of Maryland, from other States, and on the face of the Act of 1927, it is not an inspection law, or does not impose this burden for the purpose of inspection, and therefore, it is laid, and has the effect of a tax upon imports, but more particularly this Act of 1927 does not conform to the Constitutional requirement of a provision to raise money for regulation or inspection, but on its face, purports to be a revenue law.

C. Article 4, Section 2 of the Constitution of the United States:

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

For the reasons hereinbefore given, with reference to Article 14, Section 1 of the Constitution of the United States, oyster packers as a class of citizens are denied privileges and immunities as citizens of the State of Maryland, and as compared to citizens of the other several states of the Union, in that this burden is placed upon them exclusively and only.

D. Declaration of Rights, Constitution of Maryland, Article 8:

"That the legislative, executive and judicial powers of government ought to be forever separate and distinct from each other, and no person exercising the functions of one of said departments, shall assume or discharge the duties of any other."

In the Act of 1927, the Legislature has attempted to delegate to an administrative or executive department of the Government, the power of levying or fixing the rate and [fol. 13] amount of taxation, in that it attempted to grant to the Commissioner, the power, in his discretion, to determine whether his department will take shells, that is, property, or money, and says on the first day of May, the Commissioner would consider all the circumstances of the price oyster shells are selling for, and whether or not he could buy them on the first of May at such price that they might advance or be less in price between then and the time of removal of the shells, and is an attempt to vest in the Commissioner the power of determining what shall be the price paid, and his election to take either shells or money, is an attempt to vest in him the power to impose, levy and collect a tax, while the Legislature alone can fix the amount of tax, and it must be uniform on the same class of property throughout the State, whereas, oyster shells will undoubtedly have a different price in one location from that in another location in the State, and if the Commissioner was to decide that money in lieu of shells would serve his purpose better, then that would have to be done throughout the State, because one packer could not give shells and other money, and the attempt to place this power in one of the Departments, is combining it with the judicial, executive and legislative departments of the State, because it is an attempt to place all three powers in this department, in other words, the Legislature cannot delegate to a department the power to determine what amount is due by one person or any person, which is in the nature of a tax, as that must be fixed by the Legislature alone.

E. Article 15 of the Declaration of Rights, Constitution of Maryland:

"And all taxes thereafter provided to be levied by the State, for the support of the General State Government and by the Counties and by the City of Baltimore, for their respective purposes shall be uniform as to land within the taxing district and uniform within the class or sub-class of improvements on land and personal property, which the respecting taxing powers may have directed to be subjected to the tax levy."

As hereinbefore stated, with reference to the Constitution of the United States, the Act of 1927, attempts to impose a tax upon oyster shells in the hands of a packer, but [fol. 14] does not impose it upon oysters in the hands of any other class of persons, therefore, this attempted tax is not uniform, as to the same class of personal property, but is laid upon it in the hands of a particular selected class of persons, and such taxes are not laid with a political view for the good government and benefit of the community, because it is not a regulation or occupational tax, but on its face, purports to be an act to raise revenue, and revenue which is devoted for the benefit of those who catch and sell oysters, but do not pack them, they receiving the sole benefit of this tax, therefore, it is not for the general welfare of the whole State, and all the people therein.

F. Article 23 of the Declaration of Rights, the Constitution of Maryland:

"That no man ought to be taken or imprisoned or disseized of his freehold, liberty or privileges or outlawed or exiled or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or by the law of the land."

The act of 1927 violates this provision of the Maryland constitution for the reasons hereinbefore set forth, with reference to Article 14, Section 1, and Article 4, Section 2 of the Constitution of the United States.

G. Article 3, Section 40, the Constitution of Maryland:

"The General Assembly shall enact no law authorizing private property to be taken for public use, without just

compensation as agreed upon between the parties, or awarded by a jury, being first paid or tendered to the party entitled to such compensation."

The act of 1927, by taking oyster shells or money in lieu of shells from the packer, that do not come from the waters or the natural oyster grounds or rocks of the State of Maryland, or shells that come from oysters on bottoms leased by the State of Maryland, takes property which is exclusively that of the packer, even if it is conceded that the State could take shells from the oysters from its natural oyster grounds or rocks, and it is upon this theory only, that this Act can have the slightest reason to stand, but even so, it goes still further and takes the property or money in lieu of property, which comes from other waters or grounds than the State of Maryland, or from grounds [fol. 15] which the State has leased, in neither case does the State have the slightest claim to the property, and, of course, the Act does not provide any compensation, private property cannot be taken by the State, for private reasons, and if the oyster shells or money, taken by the State, is for a class of people, that follow oystering only, then it is a taking of private property, which cannot be done under the Constitution, and if it is a public use, or is so considered, still no compensation is provided and the property cannot be taken.

14. That the provision in the said Act of 1927, which provides "Or at the discretion of the Conservation Department, its equivalent in money, the value thereof being determined at the market value of shells as of the first day of May following the close of the season. The Conservation Department shall notify each packer or canner on or before the said first day of May whether it is its intention to take the ten per cent. of the shells from oysters shucked as aforesaid, or its equivalent in money," is an unconstitutional attempt on the part of the Legislature to delegate the taxing power, which is vested in the General Assembly exclusively, in as much as said provisions of said Act places it in the discretion of the said Conservation Department to determine whether it will take property or money in lieu of property, and how much or to what extent would be delegating to a Department or an officer of

the State Government, the power to determine the levying of a tax.

15. That the said Act of 1927, as to the provision therein as to shells or money in lieu of shells, is not a license fee imposed for the purpose of regulating or restraining any business or occupation or imposed in the exercise of the police power, but the object of the said Act as to the said subject of shells, is to raise revenue.

16. That it is possible that the two subjects of the said Act of 1927, that is, the one subject which re-enacts section 91 of Article 72 of the Code of Public General Laws of Maryland, with the exception of a change as to the place of issue of license, can be separated entirely from the second subject of the said Act, which requires the licensee to give ten per cent. of oyster shells or money in lieu of shells and if the two subjects can be separated by the Court [fol. 16] then that part of the Act with reference to the first subject is constitutional, while the second subject of the Act, as to shells or money in lieu of shells is unconstitutional, and your petitioners allege that the said second subject of the said Act of 1927, is unconstitutional, but if the said two subjects are so inextricably joined that they cannot be separated, then the entire Act is unconstitutional.

17. That assuming the Constitutionality of the said Act of 1927 as to the subject of shells, or money in lieu of shells, the said Conservation Commissioner, prior to the first day of September, 1927, delivered to your Petitioners a form of application for them to sign, which application recites that it is in accordance with the terms of the license which may be granted to the applicant as provided for in Chapter 119 of the Acts of 1927 and it further recites that the applicant has read Section 91 of Article 72 of the Code of Public General Laws of Maryland as the same is printed below in the application, and the applicant agrees to execute the contract as to the delivery of ten per cent. of shells to the State of Maryland, or its equivalent in money, under the condition therein provided and at the bottom of the said application is a copy of the said Chapter 119 of the Acts of 1927, which is so referred to in the application as to incorporate the Statute therein.

A copy of the said application being filed herewith marked "Petitioner's Exhibit 2."

18. That the said Conservation Commissioner has prepared a formal contract, to be signed by the applicant for a license, all of which is to follow and to be subsequent to the application hereinbefore referred to, in which contract the said Conservation Commissioner is a contracting party, though the said Statute does not confer such power and authority upon him, for it designates no person or department to execute any contract, and in this purported contract, the licensee is required to agree to turn over to the State of Maryland at least ten per cent. of shells from the oysters shucked at his establishment for which the license is issued for the current season.
[fol. 17] A copy of said contract being herewith filed marked "Petitioner's Exhibit 3."

19. That all of the provisions of the said Chapter 119 of the Acts of 1927, purporting to declare a license to pack oysters a contract between the licensee and the State of Maryland, by which the licensee shall turn over to the State of Maryland at least ten per cent. of the shells from all the oysters shucked by the licensee or the equivalent thereof in money, in the discretion of the Conservation Department, is in violation of both the Constitution of the United States and the Constitution of the State of Maryland, as hereinbefore recited, and your Petitioners allege that all of said provisions and the whole of said subject of the said Act is invalid and that your Petitioners are entitled to a license as they have applied for, without the said provision as to shells, or money in lieu of shells being in any way applicable to them, because the said provision is void.

20. That your petitioners having duly applied to the said head of the Conservation Department of Maryland and the said Conservation Commissioner of Maryland for a license as aforesaid, and having duly tendered to him all lawful charges therefor and having done any and all acts and things lawfully required of them in connection therewith, and having been denied and refused such license by him, except upon the condition that your petitioners should enter

into the agreement and contract as hereinbefore alleged, in accordance with the provisions of said Chapter 119 of the Acts of 1927, which said Act, in so far as it undertakes to require such contract or agreement, your petitioners expressly allege and assert is unconstitutional and void, your petitioners are without remedy in the premises unless the said Conservation Department of Maryland shall be ordered and directed by this Court to issue a license to said petitioners to engage in the buying, selling, marketing, packing and canning of oysters without requiring your said petitioners to enter into any contract or agreement or to accept a license in the nature and form of a contract or agreement between the State of Maryland and your petitioners, that they, the said petitioners, shall turn over to the State of Maryland at least ten per cent. of the shells [fol. 18] from the oysters shucked in their establishment for the current season, or, at the discretion of the Conservation Department, its equivalent in money, the value thereof being determined at the market value of shells as of the first day of May following the close of the season.

21. That the appropriate remedy of your petitioners, is by the writ of mandamus, to have the Court declare null and void, the part of the aforesaid Act of 1927, which fixes as a condition, to the obtaining of a license to pack oysters, that the licensee shall give to the State oyster shells or money in lieu of the shells.

22. Your petitioners therefore, pray your Honors that a writ of mandamus may be issued, directed to the said Swepson Earle, Esq., head of the Conservation Department of Maryland and the Conservation Commissioner of Maryland, commanding him to issue a license to pack oyster, without any obligation or duty in the nature of a contract or otherwise, to turn over to the State of Maryland, any oyster shells or money in lieu of shells and that the said license shall be issued to your petitioners as formerly issued under Section 91 of Article 72 of the Code of Public General Laws of Maryland, 1924, except that the

license shall be issued by the Conservation Commissioner instead of the Clerk of the Court.

And, as in duty bound, etc.,

I. L. Leonard and Company, by Thos. B. Leonard, Petitioners. V. Calvin Trice, Attorney for Petitioners, Cambridge, Md.

[fol. 19] PETITIONERS' EXHIBIT NO. 1 AND CHECK FOR $25.00 FILED WITH THE PETITION FOR MANDAMUS

Application to Buy, Sell, Market, Pack, Can Oysters or Otherwise Prepare Them for Market

Application is hereby made to the Conservation Department of Maryland, Hon. Swepson Earle, Commissioner, by Ivy L. Leonard and Thomas B. Leonard, co-partners, trading as I. L. Leonard & Co., for a license to buy, sell, market, pack or can oysters, or otherwise prepare them for market during the oyster season beginning September 1st, 1927, said operations to be at our one and only plant for such business, located in the City of Cambridge, Dorchester County, Maryland, and the sum of twenty-five dollars ($25.00) by check, is herewith inclosed for the said license, we are both residents and citizens of Dorchester County, State of Maryland.

In making this application, we deny that the said license will be a contract between us and the State of Maryland, by which we will render or turn over to the State of Maryland, and shells, or money in lieu of shells and we will not execute any contract for said purpose, nor will we turn over to the State of Maryland and shells, or money in lieu of shells.

This application for license is made to the Conservation Department of Maryland, because the Acts of the General Assembly of Maryland, 1927, Chapter 119, is one of its provisions, requires the license to be issued by the said Department, but these applicants deny that the provisions of the said Act, making the license a contract between the licensee and the State and requiring the licensee

to turn over to the State of Maryland at least ten per cent of the shells, or money in lieu of shells, are constitutional, and said provisions of the said Act violates the constitutions of the United States, and of the State of Maryland, and it may be that said provisions may make the whole Act invalid or invalid in part, as the case may be, and these applicants reserve all their rights to contest the consti- [fol. 20] tutionality of the said Act of Assembly, in the Courts of the State of Maryland.

I. L. Leonard and Co., by T. B. Leonard.

Dated at Cambridge, Maryland, this 30th day of August, 1927.

Check of I. L. Leonard and Company for $25.00 Filed with Petitioners' Exhibit No. 1

Cambridge, Md., Aug. 30, 1927. No. —.

The National Bank of Cambridge

Pay to the order of Conservation Department $25.00. Pay 25 and 00 cts. —Dollars.

I. L. Leonard & Company, by T. B. Leonard.

On the stub end of check: I. L. Leonard & Co., Oyster Packers.

Written across the face of the check is the following: Good when properly endorsed. T. Hanna Smith, Assistant Cashier.

Letter of Swepson Earle, Commissioner, Dated August 31st, 1927, and Directed to C. Calvin Trice, Attorney at law, Cambridge, Maryland, and Marked Petitioners' Exhibit No. 1

[fol. 21] State of Maryland, Conservation Department, 512 Munsey Bldg., Baltimore, Md.

August 31st, 1927.

V. Calvin Trice, Esq., Attorney-at-law, Cambridge, Maryland.

DEAR SIR: We are in receipt of your letter of the 30th instant, enclosing application for oyster packer's license by Messrs. I. L. Leonard Company of Cambridge, Maryland. The application is not in the form prescribed by this Department, and we must, therefore, refuse to accept the same. The application and your check for $25.00 are herewith returned.

Very truly yours, Swepson Earle, Commissioner.

SE/M.
ENCL.

PETITIONERS' EXHIBIT No. 2 FILED WITH THE PETITION FOR MANDAMUS

Application to Buy, Sell, Market, Pack, Can Oysters or Otherwise Prepare Them for Market

Application is hereby made to the Conservation Department of Maryland by* ——— ———, (Postoffice address:) ——— ———, for a license to buy, sell, market, pack, or can oysters, or otherwise prepare them for market during the oyster [fol. 22] season beginning September 1st, 19—, said operations to be at — plant, located at (Street and Number:) ———, (City:) ———.

The sum of Twenty-five ($25.00) Dollars is herewith enclosed to apply in accordance with the terms of the license which may be granted to —, as provided for in Chapter 119 of the Acts of 1927.

I have read Section 91 of Article 72, of the Code of Public General Laws of Maryland as same is printed below, and agree to execute the contract as to the delivery of ten per cent. of shells to the State of Maryland, or its equivalent in money, under the conditions therein provided.

——— ———.

(*If corporation, give correct corporate name. If partnership, state correct name of each member of firm.)

(Applicant should tear off here and keep for his information.)

Section 91 of Article 72 of the Code of Public General Laws of Maryland, Title "Oysters," Subtitle "Packing oysters," as Same was Repealed and Re-enacted by Chapter 119 of the Acts of 1927

91. It shall be unlawful for any person, firm or corporation having a fixed place of business, buying oysters and employing labor to prepare them for market to engage in the business of buying, selling, marketing, packing or canning oysters without first taking out a license to engage in such business by application to the Conservation Department of Maryland. Where any such person, firm or corporation operates more than one house for the buying, selling, marketing, packing or canning of oysters, a separate license should be obtained for each house in which oysters are shucked or otherwise prepared for market; such license to be in the nature and form of a contract between the State of Maryland and the applicant and shall provide for the [fol. 23] payment of a license fee of twenty-five dollars, and shall further provide that the licensee must turn over to the State of Maryland at least ten per cent. of the shells from the oysters shucked in his establishment for the current season, said shells to be removed on or before the twentieth day of August of said season; or at the discretion of the Conservation Department its equivalent in money, the value thereof being determined at the market value of shells as of the first day of May following the close of the season. The Conservation Department shall notify each packer or canner on or before the said first day of May whether it is its intention to take the ten percentum of the shells from oysters shucked as aforesaid, or its equivalent in money. Said license shall have effect from the first day of September in the year in which it may have been obtained until the twenty-fifth day of April, inclusive, next succeeding.

PETITIONERS' EXHIBIT NO. 3 FILED WITH THE PETITION FOR MANDAMUS

This agreement, made this — day of ——, in the year Nineteen Hundred and ——, by and between the State of Maryland, by the Conservation Commissioner, party of the first part and —— ——, part- of the second part:

Whereas, the General Assembly of Maryland, at its session held in the year Nineteen Hundred and Twenty-seven, by Chapter 119, repealed and re-enacted Section 91 of Article 72 of the Code of Public General Laws of Maryland, title "Oysters," sub-title "Packing Oysters," so as to require any person, firm or corporation desiring to buy, sell, market, pack or can oysters or otherwise prepare them for market, to secure separate license for each house; prescribing a fee of Twenty-five Dollars for each license and providing further that such licensee must turn over to the State at least ten per cent. of the shells from the oysters shucked in — establishment or its equivalent in money, and that such license shall be in the form of a contract between the State of Maryland and the Licensee;

Now, therefore, this agreement witnesseth, That in con- [fol. 24] sideration of the premises and the sum of twenty-five dollars, and the agreement on the part of the part- of the second part to turn over to the State of Maryland at least ten percentum of the shells from the oysters shucked, if any, in or at the establishment for which this license is issued for the current season; provided said shells are removed on or before the twentieth day of August following expiration of this license; or at the discretion of the party of the first part, its equivalent in money, the value thereof being determined at the market value of shells as of the first day of May following the season for which this contract is executed;

The State of Maryland hereby grants unto —— —— a license, previously applied for by the part- of the second part, to engage in the business of buying, selling, marketing, packing, canning or otherwise preparing for market oysters at — plant located at —— from the first day of September, in the year Nineteen Hundred and ——, until the twenty-fifth day of April, inclusive, next succeeding; and the part- of the second part, in consideration thereof, agrees to comply with the terms of this agreement, provided the party of the first part shall notify the part- of the second part on or before the first day of May next succeeding the granting of this license whether it is the intention of the party of the first part to take the ten percentum of shells of oysters shucked as aforesaid, or its equivalent in money. But if the party of the first part shall fail to

notify the part- of the second part on or before said first day of May as aforesaid, then the part- of the second part may at — option either furnish the ten percentum of shells required or its equivalent in money, to be determined as above provided.

Witness the hands and seals of the parties hereto, the day and year first above written.

The State of Maryland, by —— ——, Conservation [fol. 25] Commission of Maryland. Attest: —— ——, Chief Clerk. Signature of Corporation: —— ——, by —— ——, President. Attest: —— ——, Secretary.

Test: —— ——. (Seal.)
Test: —— ——. (Seal.)
Test: —— ——. (Seal.)

Affidavit on the Petition for a Writ of Mandamus

State of Maryland,
Dorchester County, ss:

I hereby certify that on this 26 day of September, 1927, before me, the subscriber, a Notary Public, of the State of Maryland, in and for Dorchester County, personally appeared Thomas B. Leonard, one of the Petitioners named in the aforegoing petition and a member of the partnership or firm consisting of himself and Ivy L. Leonard, trading as I. L. Leonard and Company, and he made oath in due form of law that the matters and things stated in the aforegoing petition are true, to the best of his knowledge, information and belief.

As witness my hand and seal Notarial.

George W. Meekins, Notary Public. (Seal.)

[fol. 26] In Baltimore City Court

Order to Show Cause

The aforegoing petition, exhibits and affidavit, having been read and considered, it is thereupon, this 28th day of September, 1927, by the Baltimore City Court, ordered that a Rule be, and it is hereby laid upon Swepson Earle,

Esq., head of the Conservation Department of Maryland, requiring him to show cause, on or before the 8th day of October, 1927, why the writ of mandamus should not be issued as prayed in the aforegoing petition, and that the 10th day of October, 1927, be, and it is hereby fixed for a hearing of the said petition, provided a copy of this order be served on the said Swepson Earle, Esq., head of the Conservation Department of Maryland, on or before the 4th day of October, 1927.

Albert S. J. Owens, Judge of the Baltimore City Court.

IN BALTIMORE CITY COURT

DOCKET ENTRIES

28th September, 1927.—Copy of the Order of Court sent to the Sheriff to be served on Swepson Earle, Conservation Commissioner. "Copy of the within Order of Court served on Swepson Earle, Conservation Commissioner and Head of Conservation Department of the State of Maryland on the 29th day of September, 1927, in presence of Adam S. Buck."

15th October, 1927.—Appearance by attorneys for the Respondent.

IN BALTIMORE CITY COURT

ANSWER—Filed Oct. 15, 1927

To the honorable the judge of said court:

The answer of Swepson Earle, Conservation Commissioner of Maryland, defendant in the above entitled cause, to the petition of Ivy L. Leonard and Thomas B. Leonard, [fol. 27] co-partners trading as I. L. Leonard & Company, against him in this Court exhibited, respectfully shows:

This respondent, reserving all manner of exceptions to said petition for its manifold errors, irregularities and improper statement of facts, for answer thereto, or so much thereof as he is advised it is material for him to answer, answering says:

1. That said petition, and each and every paragraph thereof, are bad in substance and insufficient in law.

2. That said petitioners have not stated in their petition, or in any paragraph thereof, such a case as entitles them to the relief prayer.

3. This respondent admits the allegations of the first paragraph of said petition.

4. Answering the second paragraph of said petition, this respondent denies that any action taken by him in this case has prevented or will prevent the petitioners from using any of their property for the packing of oysters, or that the said petitioners will suffer irreparable loss, injury and damage, of a nature, kind and extent that cannot be certainly determined, or that they will suffer loss, injury and damage of any kind whatsoever by reason of any action of your respondent.

5. Your respondent denies the allegations of the third paragraph of said petition.

Further answering said paragraph, your respondent alleges that according to the reports submitted by the petitioners to the Conservation Department, as required by law, for the oyster packing season of 1926-1927, only 2% of all the oysters shucked in the establishment of the petitioners during said season do not come from the waters of the State of Maryland; and that during the oyster packing season of 1925-1926, only 1-3 of 1% of the oysters shucked in the establishment of the petitioners were oysters from States other than the State of Maryland; that in Somerset County, Maryland, the quantity of oysters from the State of Virginia shucked and packed by packers and canners in said County approximately 16% (and not, as alleged in said third paragraph of said petition, 50%) of [fol. 28] all the oysters shucked and packed in said County.

6. Your respondent admits the allegations of the fourth, fifth, sixth and seventh paragraphs of said petition.

7. Answering the eighth paragraph of said petition, your respondent denies that Chapter 119 of the Acts of 1927,

embraces two subjects, and, on the contrary, avers that the said Act embraces but one subject, namely, the issuance of licenses for the packing of oysters.

Further answering said paragraph, your respondent admits that said Act of 1927 provides that the Conservation Department of Maryland is charged with the duty of issuing the licenses thereunder, whereas, under the Section, of which the said Act of 1927 is amendatory, the license was issued by the Clerks of Court of the respective Counties of Maryland, and the Clerk of the Court of Common Pleas of Baltimore City.

8. Your respondent denies the allegations or implication of the ninth paragraph that the said Act of 1927 embraces more than one subject, and admits that under the said Act the license to pack oysters shall be in the nature and form of a contract between the State of Maryland and the applicant, upon the terms set forth in said paragraph.

9. Your respondent denies the allegation of the tenth paragraph that no person or department of the State is by said Act or by law of the State designated, empowered or authorized to execute any such contract, but on the contrary, avers that the power to execute said contract is clearly vested in the Conservation Commissioner of Maryland under the laws of the State.

10. Your respondent admits the allegations of the eleventh paragraph of said petition, but avers that the applicability of the Act to shells from oysters from other States and the shells of oysters from oyster bottoms leased by the State of Maryland to oyster planters, does not in any away affect the validity of said Act.

11. Your respondent emphatically denies the allegations [fol. 29] and conclusions of law set forth in the twelfth paragraph of said petition.

12. Your respondent emphatically denies that the said Act of 1927 is in violation of any provision of the Constitution of the United States and of the Constitution of the State of Maryland, and also specifically denies that the said Act is in violation of any of the provisions of the Constitution of the United States and of the Constitution of

the State of Maryland quoted and referred to in said paragraph.

13. Your respondent denies the allegations and the conclusions of law set forth in the fourteenth and fifteenth paragraphs of said petition.

14. Your respondent denies the implication of the sixteenth paragraph of the petition that the said Act embraces two subjects, and avers that all of the provisions of said Act are valid and constitutional.

15. Your respondent admits the allegations of the seventeenth paragraph of said petition.

16. Answering the eighteenth paragraph of said petition, your respondent admits that he has prepared a formal contract in the nature of a license, to be signed by the applicant for a license, as therein set forth, but denies all of the other allegations and conclusions of law set forth in said paragraph.

17. Answering the nineteenth paragraph of said petition, your respondent denies that any part of the Act is void or unconstitutional.

18. Your respondent denies the conclusions of law and allegations set forth in the twentieth paragraph of said petition.

19. Your respondent denies the allegations and conclusions of law set forth in the twenty-first paragraph of said petition, although your respondent does not intend thereby to question the jurisdiction of this Court to determine the issues raised by these proceedings.

And finally, your respondent says that all the allegations of fact and conclusions of law in said petition not herein specifically admitted or denied, are hereby denied.

[fol. 30] And having fully answered said petition, this respondent prays that the case may be dismissed and that the plaintiff be required to pay the costs.

And, as in duty bound, etc.

Thomas H. Robinson, Attorney General, R. H. Archer, Asst. Attorney General, Henry H. Johnson, Attorneys for Respondents.

Affidavit Annexed to the Answer

STATE OF MARYLAND,
City of Baltimore, To wit:

I hereby certify, that on this 15th day of October, 1927, before me, the subscriber, a Notary Public of the State of Maryland, in and for Baltimore City, personally appeared Swepson Earle, Conservation Commissioner, and made oath in due form of law that the matters and facts set forth in the aforegoing answer are true to the best of his information, knowledge and belief.

Witness my hand and notarial seal.

Harold Smith Kolner, Notary Public. (Seal.)

Issue joined (short) on the demurrer.

IN BALTIMORE CITY COURT

DEMURRER TO ANSWER

Demurrer on Behalf of the Plaintiffs to the Answer of the Defendant Filed the 18th Day of October, 1927

To the honorable the judge of said court:

The plaintiffs in this case demur to the answer of the defendant filed in this proceeding, and for grounds of demurrer say:

First. That the same is not sufficient in law.

[fol. 31] Second. That nothing is alleged in said answer which is a ground for denying the prayer of the petition filed by Plaintiffs in this case.

Third. That said answer fails to disclose any reason why the writ of mandamus should not issue by this Court as prayed in plaintiffs' petition.

V. Calvin Trice, William L. Rawls, Attorneys for Petitioner.

Issue jointed (short) on the demurrer.

IN BALTIMORE CITY COURT

DOCKET ENTRIES

18th October, 1927.—Appearance of William L. Rawls as attorney for the Plaintiffs.

25th October, 1927.—Appearance of Harry C. Dashiell as attorney for the Petitioners.

Stenographic transcript filed the 4th day of November, 1927.

Tuesday, October 25th, 1927.

The above entitled matter came on to be heard before his Honor, Judge Albert S. J. Owens, on Tuesday, October 25th, 1927, at three o'clock in the afternoon.

Messrs. V. Calvin Trice and William L. Rawls appeared in behalf of the Petitioners.

Messrs. Henry H. Johnson and Robert H. Archer appeared in behalf of the Respondents.

Argument thereupon followed until the hour of adjournment, at which time an adjournment was taken until Wednesday, October 26th, 1927.

[fol. 32] Wednesday, October 26th, 1927.

Pursuant to adjournment the Court met in the above entitled matter at twelve o'clock noon.

(Argument followed until 12.40, at which time a recess was taken until 1.40 P. M.)

IN BALTIMORE CITY COURT

COLLOQUY BETWEEN COURT AND COUNSEL

(Argument continued.)

(The Court, orally:) I understand that some additional papers have to be filed to these pleadings, in other words,

as the case stands, the ruling on the demurrer cannot properly be made. Now, I am prepared, if you gentlemen want me to do so, to decide the law question presented to me here today, but I will only do so with the understanding that this case when it goes to the Court of Appeals does not go in an unfinished form, and goes down to the Court of Appeals by amendment of the proceedings wherever necessary, or additions to them, in such a way as not to let the Court of Appeals think that I decided a case before it was at issue. You gentlemen are going to take care of the pleadings?

(Mr. Archer:) As I understand from Mr. Rawls—if I am not right, let him correct me—the difference is as to the percentage of oysters that come from out of the State.

(The Court:) If I am to decide the question you people must fix these papers so that the question I decide is a matter of law, and if you cannot do it among yourselves I am not going to decide it at all.

(Mr. Archer:) It is just with reference to those percentages. The only question of fact is as to those percentages of out of the state oysters. Those percentages on behalf of the State are based on actual figures which were turned in by the packers to the Conservation Department. We stand on those. I told Mr. Rawls that at his convenience he could examine the Department's records, and if we had made a mistake in figuring the percentage we could correct that in the Answer. That is all I can agree to.

{fol. 33} (The Court:) I do not want this case taken down to the Court of Appeals on some question of pleading, and I look to counsel to prepare the pleadings in the case so that the law question alone is presented.

(Mr. Archer:) The only thing that could be changed would be those percentages.

(The Court:) Then you must provide me with some finding of fact or else eliminate it in some way.

(Mr. Rawls:) That is right, we will do that, your Honor.

Memorandum Opinion

(The Court:) Now, gentlemen, I studied this question last night and, of course, in one night it could hardly be expected that I would be able to get as sound a conclusion on the question as you competent and distinguished gentlemen who have presented it here to me did, but I did form an opinion, and I started out to write an opinion, but when I realized that if I were to try to do that, that in order to pay proper attention to the very serious questions involved, it might take me so much time, with the many things I have to do here during the day, that I might delay my opinion for a longer period of time than a Judge ought, with reference to the matter that affects very seriously the operation of the State Government. And therefore I concluded to jot down some notes and then to attempt orally to give my reasons to you.

Of course, you gentlemen know that a man who has been living all his life in the City of Baltimore and going from one end of the State to the other in the discharge of his professional duties, and therefore meeting everybody who is anybody from one end of the State to the other, forms a very extended acquaintance and knows nearly everybody who in any way could come before you to practice law both in your City and your State, and it is one of the pleasures and one of the embarrassments of this office to which I have been elected that I have to decide questions between personal friends, so to speak, and yet the mere fact that I realize that I can still retain their personal friendship, no matter how I decide those questions and how sorry they may feel for me, gives me a certain amount of independence in the matter and allows me to render a decision without hesitation.

[fol. 34] In thinking over this matter it occurred to me that when Columbus sailed on his voyage of discovery there was extant a map showing that west of the Azores was an enchanted territory terminated by the world's end at which the waters of the Atlantic poured into a bottomless pit. I have in my library a reproduction of this map showing the mountains of loadstone that would pull nails out of vessels, waters filled with marine monsters and the rushing waters pouring into this bottomless pit. It is a very

striking and alarming picture. The credulous world at that time believed this to be true and feared to investigate or explore. Columbus did not, and he found it false. When we are confronted with a novel situation we are naturally inclined to be apprehensive.

There is no doubt that the act under consideration is a novelty and experiment in the field of legislation. My attention has not been called to any legislative precedent for this Act, except perhaps the slight reference made a few minutes ago to the laws of the State of Texas, which have not actually been called to my attention but which I assume are somewhat similar.

The fathers who framed the Constitution of this State and fathers who framed the Constitution of the United States as well were apprehensive of the tendency of Government when vested with arbitrary powers to over-ride or ignore the rights of the individual citizen. To absolutely insure the protection of the individual citizen you will find attached to the State Constitution our Declaration of Rights and the first ten amendments attached to the Constitution of the United States.

While, therefore, under the policy of our law the reserved rights of the individual must be protected, still we must not be frightened, in our effort to do this, into the other extreme of so tying up the administration of the State Government, which is to be administered for the benefit of all, that it be prevented from functioning in a situation of great moment.

In the Charter granted by King Charles to Lord Baltimore the inhabitants of Maryland were granted the common Right of Fishery, and by reason of our surpassing water facilities this Common Right of Fishery is one of the most [fol. 35] valuable heritages of our people. Throughout the years large fortunes have been made from its prosecution, but above and beyond all by reason of the courage and intelligence required of those whose vocation it has been and is, it has developed a type of citizenry from whose ranks men have sprung who have held high positions in the State and Nation, who have helped to mold our institutions, and have been of those upon whom the people relied in critical periods of our history. They were tried and not found wanting.

It is natural, therefore, that the oyster industry, a part of this common Right of Fishery, should have been, as it has been the subject of continuous legislation. And the Act now under consideration is a part of what was done with reference thereto at the last session of the Legislature of Maryland. Now, what is the Act that the Legislature passed. They passed a law, Chapter 119 of the Acts of 1927, An Act to Repeal and Re-Enact with Amendments Section 91 of Article 72 of the Code of Public General Laws of Maryland, Title "Oysters," sub-title "Packing Oysters," and to add a new section to Article 72 of the Code of Public General Laws of Maryland, title "Oysters" sub-title "Packing Oysters," to be known as 91-A to follow immediately after section 91 in said Article.

Then there is a preamble to that Act:

"Whereas, the demand for oysters is constantly increasing and the oyster bars and rocks of the Chesapeake Bay and its tributaries are showing such great depletion that constructive legislation is necessary to preserve and rehabilitate such depleted areas, and

Whereas, a Seafood Committee, consisting of representatives from each tidewater county, was appointed by Governor Albert C. Ritchie, to investigate and recommend remedial legislation to increase the oyster supply of Maryland, among which was the recommendation that the State should reserve ten per cent. of all shells made by the oyster packing houses to be planted upon reserved and seed areas; therefore;

Section 1. Be it enacted by the General Assembly of Maryland, That Section 91 of Article 72 of the Code of [fol. 36] Public General Laws of Maryland, title "Oysters," sub-title "Packing Oysters," providing for licensing of oyster packers be and is hereby repealed and re-enacted with amendments,"

and so forth.

The provisions of the Bill in its entirety everyone of you here know. The objection is made that this bill violates the provisions of the Constitution of the State of Maryland and the provisions of the Constitution of the United States. As a starting point the Relators charge that the Bill em-

braces two subjects, one subject providing for the issuing of licenses for the packing of oysters, and the other or second subject, a provision that the license to pack oysters shall be in the nature and form of a contract.

In looking at the Act I find by its very terms that that objection cannot be maintained, for the reason that the Act itself provides after the statement that those who desire to pack oysters shall take out a license, "such license to be in the nature and form of a contract between the State of Maryland, the entire license to be in the nature and form of a contract between the State of Maryland and the applicant and shall provide for the payment of a license fee of twenty-five dollars, and then the other provision. Manifestly, therefore, this license was entire and must be taken out in a way that would include within the license the contract for 10% of shells as provided by the law.

Now, when we come to that contract we are met by very cogent reasoning and very able argument, and, as I said at the outset, I was very apprehensive about the matter at first because I thought I saw some very great and grave inequalities that might be possible under the Act. But when I came to consider the Act I realized that those inequalities really could not be, that the words in the contract at least 10% could not mean that it would ever be within the power of the State Conservation Department to exact more than 10%. At first I thought it could. But I was certain after examining the Act critically last night that that could not be the case. Then I thought there were grave inequalities that might be practiced by the Conservation Department on people differently located. But I realized that that was a [fol. 37] matter of the administration of the law, and if the State Department did do anything that was unjust the Courts would immediately stop that irregular and improper and one-sided attempt to operate under the law. Then I came to the consideration of what is the necessity, the real reason for this Act, and I came back to my own knowledge of the subject matter. I realized after considering the matter that when this Act was passed imposing upon the packer this contribution of not less than 10% of his shells that the reason of it consisted in the fact that the packer is the certain reservoir of the shells needed by the State

and that the only way to get shells in quantity sufficient for the purpose of the reconstruction and rehabilitation and renewal of this priceless heritage of our people was by getting the shells from that source. There was no other way in the world that we could within the limits of the State of Maryland get shells in sufficient quantity for this very urgent and necessary situation except at prohibitive prices and therein I find the reason of the law. I find that the purpose and object of the Act did have a direct relation to the subject matter, which is the beginning point of all sound legislation, as I understand it.

Now, I am confronted by the argument, "You cannot do this, you cannot take these shells of ours willy-nilly away from us. That is a wrong thing, because you are confiscating private property for a public use and you have no right to take private property for a public use without just compensation." Well, I do see some just compensation. I say that no man has a right to conduct the business of an oyster packer or to continue to conduct the business of an oyster packer in the State of Maryland unless he complies with the law under which he is licensed, and does what the law says he shall do, and the law says unless you are willing to give the State 10% of your shells or pay their equivalent in money, if the State does not need them for this great reclamation purpose which they propose to carry on, you cannot have a license, to conduct business. And a man comes along and says, yes, I am perfectly willing to do that, and he signs an agreement and he gets his license, and as a consideration therefor he is permitted to conduct the business of an oyster packer within this State.

[fol. 38] Now, in my opinion, he gets under the theory of the law just compensation, or at least he accepts it because he goes on with his business.

Now, I am again met with the argument that these oyster shells do not belong to us or do not belong to the State because a portion of these oyster shells come from other States of the Union, and that therefore when we confiscate, so to speak, using the language of the relators here, when we confiscate these shells we are taking shells that never

were a part of that common heritage to which I have referred. But you must remember, gentlemen, that at the time of appropriating these shells to the rehabilitation of the oyster territory they are no longer the shells of the people in the State from which they came, but they are within the limits of the State of Maryland and are part of the personal property of the gentlemen who are conducting this business within the State of Maryland under a license from the State and the shells are to be used for the welfare primarily of the people who take the oysters and secondly for the benefit of the relators.

I do not think it is necessary to go into any extensive discussion as to whether or not it is an occupation tax or what it is. I do not think it makes any difference really what you call it. I think under the peculiar circumstances of this case and the conditions surrounding the industry that the provision of the Act are in no sense unreasonable. They are in no sense unjust and I think if in the course of the operation of the law, as I said before, any great injustice is done to any person engaged in the business the Courts of this State stand ready to fully protect them.

I have not gone into all the questions. I mean I have not undertaken to pass upon all the questions referred to in your discussion of the case, but holding these views, and finding no positive provision of either the State or Federal Constitutions that may be said in any manner to be violated by this Act, I will overrule the demurr*ed* filed by the relators in this case and when the papers are properly fixed up I will then dismiss your bill so you can take an appeal. I want you to understand that I have passed upon this case [fol. 39] as a mandamus proceeding because I would not think for a single moment that distinguished counsel like yourselves have not already determined that this is a proper case for mandamus.

(Mr. Rawls:) Well, I think that is uncontested, as a matter of fact.

(The Court:) I understand, but yet at the same time I have treated it as a mandamus case because you gentlemen treated it as mandamus case.

(Mr. Rawls:) Your Honor, just one word about the record. I think there are only two matters that I am concerned with, that they are the portion of the oysters from

out of the State—it is conceded in Somerset County that is 16½%. I would like to go over the figures of the Conservation Commissioner and if I find that they are in accord with my information I will accept those figures. If on the contrary they are not in accordance with my information and I cannot get any agreement with my brother as to what the percentage *is* may be, it is conceivable that I would want to take a little testimony just on that point. I would also want to get the facts regarding the leased beds in the record. I cannot imagine that there would be any difference between my brother and myself and we should be able to stipulate on that. I have got the information.

(The Court:) I think there cannot be any mistake as to those figures, and I think you can amend your petition and answer or whatever is necessary by putting those figures in those papers.

(Mr. Rawls:) I should think so.

(The Court:) And that would bring up the question of law which I understand I was to decide and which I have decided and I am sorry I could not decide it both ways.

(Mr. Rawls:) If your Honor will leave the matter open——

(The Court:) You gentlemen can fix the papers up, yes.

[fol. 40] IN BALTIMORE CITY COURT

FINAL ORDER DISMISSING PETITION—Filed Dec. 22, 1927

This case having come on for hearing upon the *the* demurrer, of the plaintiffs to the answer of the defendant and the case having been fully considered, it is ordered by the Baltimore City Court this 22nd day of December, 1927, that the said demurrer of plaintiffs to the answer of the defendant be and the same is hereby over-ruled and it being stated in open Court by Counsel for the plaintiffs that the said plaintiffs intended to stand upon their demurrer to the said answer of the defendant, it is further ordered that the said petition of the plaintiffs be and the same is hereby dismissed with costs to the defendant.

Albert S. J. Owens.

IN BALTIMORE CITY COURT

DOCKET ENTRY OF JUDGMENT

22nd December, 1927.—Judgment on the Plaintiffs' Demurrer to the Answer of the Defendant in favor of the Defendant for costs.

IN BALTIMORE CITY COURT

ORDER OF APPEAL AND AFFIDAVIT—Filed Dec. 27, 1927

Mr. Clerk:

Please enter an appeal in the above entitled case to the Court of Appeals of Maryland on behalf of the Plaintiffs from the final order and judgment of the Court, dated December 22, 1927, dismissing the petition of plaintiffs.

William L. Rawls, V. Calvin Trice, Attorneys for Plaintiffs.

[fol. 41] Affidavit of the Plaintiffs Annexed to the Aforegoing Order of Appeal

STATE OF MARYLAND,
Dorchester County, ss:

I hereby certify that on this 23rd day of December, 1927, before me the subscriber, a Notary Public of the State of Maryland, in and for Dorchester County, personally appeared Thomas B. Leonard, one of the plaintiffs in the above entitled cause, and made oath in due form of law, on behalf of said plaintiffs, that the appeal to the Court of Appeals in the above entitled case is not taken for the purpose of delay, and he further made oath that he is duly authorized to make this affidavit on behalf of said plaintiffs.

Cornelia M. Anderson, Notary Public. (Seal.)

Appellants' costs, including Record to Court of Appeals, $30.65; Appellee's costs, $6.85.

Test:

George Carey Lindsay, Clerk of the Baltimore City Court.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 42] In Court of Appeals of Maryland, January Term, 1928

No. 61

Ivy L. Leonard and Thomas B. Leonard, Copartners, Trading as I. L. Leonard & Company,

vs.

Swepson Earle, Conservation Commissioner of Maryland, Head of the Conservation Department of the State of Maryland

Opinion—Filed April 19, 1928

Chief Judge Bond delivered the opinion of the Court.

The question raised on this appeal is one of the constitutionality of an Act of the General Assembly of 1927, Chapter 119, adopting a plan for the conservation of the supply of oysters in the waters of the State. Upon recommendation of a special Seafood Committee of representatives of the tidewater counties, appointed by the Governor to investigate and recommend remedial legislation to increase the supply, which has been decreasing for some years despite the adoption of previous conservation measures, an attempt is made in this Act to provide for returning to the bottoms after each season of oystering, a quantity of shells to which the oyster spat may attach itself for its growth. In the past, so long as oyster shells were waste, having no uses for which they could be sold, it was the practice of the packers at whose hands the shells were removed from the oysters and accumulated, to dump a large portion of their accumulations each year into the State waters; and this is regarded as having been an aid in the development of new [fol. 43] oysters which was necessary to the continuation of any large supply on the bottoms, and which can best be secured for the future by continued dumping of shells. In the arguments, it has been stated that the method of returning shells to the bottoms is one resorted to in other States, especially in those bordering on the Gulf of Mexico. Shells have become salable for various commercial uses now possible, and the packers have ceased to dump them

into the waters; and the present legislation seeks a continuation of the method by law. The plan devised in the Act is to issue to the packers in the State special licenses to engage in their occupations upon their signing, and only upon their signing, agreements to surrender to the State Conservation Department ten per cent of the shells from oysters shucked by them in each coming season, or the equivalent in money for the purchase of shells or seed oysters elsewhere. The full statutory provision, out of which the questions arise on appeal, is this:

"It shall be unlawful for any person, firm or corporation having a fixed place of business, buying oysters and employing labor to prepare them for market to engage in the business of buying, selling, marketing, packing or canning oysters without first taking out a license to engage in such business by application to the Conservation Department of Maryland. Where any such person, firm or corporation operates more than one house for the buying, selling, marketing, packing or canning of oysters, a separate license shall be obtained for each house in which oysters are shucked or otherwise prepared for market; such license to be in the nature and form of a contract between the State of Maryland and the applicant and shall provide for the payment of a license fee of twenty five dollars, and shall further provide that the licensee must turn over to the State of Maryland at least ten per cent of the shells from the oysters shucked in his establishment for the current season, said shells to be removed on or before the twentieth day of August of said season; or at the discretion of the Conservation Department its equivalent in money, the value thereof being determined at the market value of shells as of the first day of May following the close of the season. The Conservation Department shall notify each packer or canner on or before the said first day of May whether it is its intention to take the ten per centum of the shells from oysters shucked as aforesaid, or its equivalent in money. Said license shall have effect from the first day of September in the year in which it may have been obtained until the twenty-fifth day of April, inclusive, next succeeding."

The uncertainty as to the amount of shells to be surren- [fol. 44] dered in the phrase "at least ten per cent," is cor-

rected by further provisions which restrict the amount to ten per cent, and we understand that no defect is found in the Act as a whole because of this expression.

The appellants have been packers of oysters in Dorchester County, and on August 30, 1927, after the Act had become effective, made application for a license to carry on their business during the oystering season to begin on September 1st following, but, contending that the attached condition of a promise to turn over part of their shells or the money equivalent would be unconstitutional, refused to sign the agreement to make the surrender. Having then been refused a license, they filed their petition for a writ of mandamus to compel its issue to them free of the agreement or condition, the appellee filed an answer, the appellants filed a demurrer to the answer and it was overruled. And the appeal is from the overruling of the demurrer. There is no question of procedure raised.

Some additional facts are presented by the papers in the case. Oysters are customarily brought to some of the Maryland packers from the waters of Virginia and New Jersey, as well as from Maryland waters; the amount has varied somewhat in past seasons, partly according to location of the packing houses, the appellants having, for instance, received two per cent of their oysters from outside waters in the season of 1926 to 1927, and one third of one per cent in the season of 1925 to 1926, while approximately sixteen per cent of the oysters packed in the border county of Somerset came from Virginia waters. It appears also that some of the oysters to be packed by the appellants would, according to the natural course of their business, come from rented or leased bottoms in Maryland.

The objections urged on the appeal are that the condition attached to the granting of the licenses under this provision is contrary to requirements of the constitutions of Maryland and the United States, in that it would involve a [fol. 45] taking of private property of the packers without compensation, and an unlawful delegation of legislative power in directing that the Conservation Department shall determine whether shells or the equivalent in money shall be required from particular packers; would deny to the packers affected the equal protection of the laws in singling them out as a limited class for the exaction, and also in-

volve a taking of private property without compensation in requiring the packers to keep and store the required ten per cent of their shells for the Department until it removes them.

The objections are to be answered for the most part, we think, upon consideration of these facts and principles: that the oysters in the State waters are originally the property of the State, that the State may subject dealing in them to limitations and conditions in the public interest, that it is in the prosecution of the business of the packers that the State supply is chiefly drawn upon and its exhaustion threatened, and that the condition to be attached to the privilege of carrying on this occupation is a safeguarding one, in substance and effect that the packers shall aid in preventing or repairing the exhaustion which the exercise of the privilege may cause. The condition, so viewed, appears to be a reasonable one, well adapted to further the public interest, and more especially the interest of the packers themselves, and we do not find any of the constitutional prohibitions to be applicable to it.

That oysters, as well as fish and game generally, are originally the property of the State, that is, of the people in their sovereign capacity, has been pointed out in previous decisions of this court. No individual has any prop- [fol. 46] erty rights in them other than such as the State may permit him to acquire; and even when they are taken and reduced to possession by an individual, his ownership may be regulated and restrained by appropriate legislation enacted for considerations of State or the benefit of the community. "In other words, the cases hold that the question of enjoyment in this field is one of public policy and not of private right." Stevens v. State, 89 Md. 669, 672; Hughes v. State, 87 Md. 298; Tyler v. State, 93 Md. 309, 311; Windsor v. State, 103 Md. 611, 618. Such "things feræ naturæ belong to the 'negative community,' in other words, are subject to the absolute control of the State, which, although it allowes them to be reduced to possession, may at its will not only regulate but wholly forbid their future taking." Ohio Oil Co. v. Indiana No. 1; 177 U. S. 190, 208. And limitations and conditions on private enjoyment need not be expressed as reservations of title similar to those which might be used by private grantors of

property conveyed, but would regularly be such as would result merely from legislation touching the subject. Dize v. Lloyd, 36 Fed. 651; McCready v. Virginia, 94 U. S. 391; Geer v. Connecticut, 161 U. S. 519; Cornfield v. Coryell, 4 Wash. C. C. 371; Freund, Police Power, 419, 422, 447; Comm. v. Hilton, 174 Mass. 29; Brooks v. Tripp, 135 N. C. 159; People v. Clair, 221 N. Y. 108; People v. Monterey Fish Products Co. 195 Cal. 548. And cases reviewed in notes: L. R. A. 1916 C 338; Ann. Cas. 1917 B 953; 32 A. L. R. 337. Accordingly this court has upheld various conditions, regulations and prohibitions for the conservation of such State property; and it has upheld previous measures imposing license or occupational taxes on oyster packers as a class to meet in part the burden of conserving the supply [fol. 47] upon which they draw. And as Judge Boyd said, in his opinion in State v Applegarth, 81 Md. 293, those exactions might be considered in the nature of fair compensation from the packers. "Such legislation on this particular subject," he said, "might well be justified on the ground that the State as owner of the oysters is entitled to a reasonable and fair compensation for them, and it may not be deemed just or wise to impose all the burden on those who oftentimes undergo great hardships and suffering catching them; and therefore those engaged in packing and canning them are called upon to contribute their share of the compensation. If the State is not to profit by sales of its property, it should at least be protected from any loss in caring for it, and those engaged in the oyster business might justly be required to contribute their proportion of the cost and expense of preserving them." And see Appelgarth v. State, 89 Md. 140. Such license fees, or occupational taxes may be graduated in amount according to the volume of business done in one establishment and another, and may have as their objects the furtherance of various public interests. Ruggles v State, 120 Md. 553, 561; State v. Shapiro, 131 Md. 168, 173.

As has been argued for the appellees, the present act may be viewed as imposing a license or occupational tax, in that it makes its demand upon persons who are to engage in a particular occupation, and the demand is to be measured by the volume of business of each one affected. And it is appropriately made upon those persons because it has

as its object the repair of damaging effects of the pursuit of their occupation. It seeks its ultimate purpose, the repair, more directly than does the usual occupational tax in demanding a contribution of tangible property rather than of money with which the property might be procured. State v. Applegarth, supra. The material which will be needed for the repair is material which will be accumulated by the packers themselves, and a contribution in kind rather than [fol. 48] one in money seems to be a direct, convenient arrangement; and it would seem to involve no further reach of governmental power. It seems to us, however, that the act may be accurately described as establishing merely a condition upon which the oyster supply of the State may properly be drawn upon and dealt in, or as fixing a necessary incident of the exercise of the privilege sought. The greater part of the burden of conservation, undertaken largely for the benefit of the packers, for the preservation of their livelihood, indeed, is to be borne by the State at large, and what is demanded of the packers as the condition of their license, may be regarded as a measure of co-operation, one which they are peculiarly equipped to contribute. There is some novelty in exacting a contribution of tangible property, even as a measure of co-operation for the private individual's benefit, or as the condition of a privilege, but novelty alone does not, of course, render it invalid. State v. Applegarth, supra. The powers of the Legislature are not derived from grants in the constitution of the State, or, indeed, from any classifications made use of in discussion of exercises of power; plenary power in the Legislature for all purposes of civil government is the rule, a prohibition to exercise a particular power is an exception, and can be founded only on some constitutional clause plainly giving rise to it. Painter v. Mattfeldt, 119 Md. 466, 472; Kenneweg v. Allegany County, 102 Md. 119, 122; Marmet v. State, 45 Ohio St. 63, 70; Nichols, Eminent Domain, 56. The constitutional prohibition against taking property without compensation, in Article 3, section 40 of the Maryland Constitution, and that against the deprivation of property without due process of law in the Fourteenth Amendment of the United States Constitution and Article 23 of the Maryland Declaration of rights, (all of which have the same meaning and effect in reference to an exac-

tion of property, Harness v. C. & O. Co., 1 Md. Ch. 248, 252), have, as it seems to us, no bearing on an exaction made as the reasonable price or condition of a license. They are not designed to prohibit an exaction of property under any and all circumstances whatever except by con- [fol. 49] demnation proceedings to secure payment of the value in money. And a property contribution as the price or condition of a license or privilege sought, while unusual, is not unprecedented. In the case of Baltimore v. White 2 Gill 444, concerning a grant of the privilege of erecting a wharf off the applicants' property in Baltimore Harbor, at a time when under the law special permission for it had to be obtained from the Mayor and City Council, the court had to consider a condition imposed that the owners dedicate part of it to the public. And the court said in its opinion, "as the case is now before us, we are bound to presume that the extension, as proposed by the Olivers, could not, in the judgment of the city authorities have been granted without detriment to navigation unless the injuries resulting from it were counteracted by the great facilities afforded to navigation by the surrender to its uses of the exterior margin of the improvement in the shape of a public wharf. If the city authorities believe that the unconditional grant of the power of improvement proposed by the Olivers would be ruinous to the navigation of the port of Baltimore, but that its effects would be wholly obviated by the facilities to navigation afforded by the wharf at the southern side of the improvement being dedicated to the use of the navigating public, were they not authorized, nay were they not bound, to withhold their assent, unless such a dedication were made? Or suppose the Olivers' original application had thus proffered the dedication, ought the corporate authorities have withheld their assent? We think not." And that exaction seems to be the same in principle as the present one. The opinion did not mention any constitutional objections, but the same prohibitions were then in force, although not yet expressed in the written constitution. 1 Blackstone, Comm. 139; Hepburn's case, 3 Bland 98; Compton v Susquehanna R. R., 3 Bland 390; Hamilton v. A. & E. R. R. 1 Md. Ch. 108, 109; Harness v. C. & O. Co., supra; New Central Coal Co. v. Georges Creek Co., 37 Md. 537, 559. An exaction of private property rights

was made as a condition to the grant of a privilege which could not be exercised except with the permission or license of the public authorities, acting in the interest of all the [fol. 50] citizens, and it was considered not only lawful but one which it was the bounden duty of the authorities to make. Compare cases reviewed in note Ann. Cas. 1912 A. 490; 1 Blackstone Comm. 358; Galoway v. State, 139 Tenn. 484.

The constitutional prohibitions, as is well known, are levelled against special exactions which will leave the individual possessors subjected to unequal deprivations and public burdens without regard to compensatory benefits. Re Dorrance Street, 4 R. I. 230, 245; Nichols, Eminent Domain, 49. They are levelled against exactions which as Chancellor Johnson said "would be at war with the great principles of natural justice." Hamilton v. A. & E. R. R. supra. They are not concerned with exactions made as reasonable conditions or in exchange for privileges, carrying full compensation, which might be withheld except upon such co-operation and might be declined by the individuals if dissatisfied with the terms. See Lewis, Eminent Domain, sec. 4; Mills, Eminent Domain, sec. 1; Moale v. Baltimore, 5 Md. 314, 320.

It may be added that as the State might exact contributions of money sufficient to buy the shells from the packers, a construction of the constitutional prohibitions making them apply to prevent stipulations for surrendering the shells, would give those prohibitions the practical effect of denying the propriety of exacting directly a contribution which is free from objection when exacted indirectly; it would be reading the constitutions to insist upon the form without any objection to the substance.

So far we have discussed the objections as if the shells to be contributed were all the full property of the packers to be licensed, or as if all were obtained from other than State bottoms. Some packers would, apparently, have no such shells in their accumulations, and some have quanti- [fol. 51] ties which are, perhaps, negligible; but packers in the border counties would have considerable ingredients of these, and we have considered the case as if some of such outside shells might be required under the Act because they would enter into the basis of calculating the ten per cent.

But the fact remains that the greater part of the accumulations, at least, will in every instance consist of shells from State bottoms, and as to these the State would retain whatever ownership or rights might result from its conservation enactments, and in receiving those shells would in effect, merely repossess them. The right to do so, under the authorities already cited, would be one of the conditions of the privilege beyond any question, we think.

The alternative exaction of a contribution in the money equivalent, at the discretion of the Conservation Department, is objected to because of the difference it authorizes between demands upon one packer and another, and because of the delegation to the department of the power to make the election and fix the money equivalent, which is regarded as an essentially legislative and non-delegable power. As the Act contemplates an election between equivalents only, it does not impose or contemplate any inequality in the amount of the exaction. The packers will hold the shells for conversion into money at the market price, and the alternative to surrendering shells to the department in kind is, in the final analysis, nothing more than paying over to the State so much of the sales price in advance of sale—or it may be after actual sale. The burden is a slight one, no greater than other burdens necessarily imposed on individuals in practical working plans for collecting taxes, as, for instance, the burden imposed upon warehousemen to advance the owners' taxes on goods deposited, as that on retailers of gasoline and oils to collect and pay the taxes on purchases from them. Hannis Distilling Co. v. Baltimore, 114 Md. 680, 681. Pierce Oil Co. v. Hopkins, 264 U. S., 137. And we think it is to be classed with those necessary burdens, and is too slight to justify stamping the whole beneficial scheme as one involving unconstitutional discrimination among packers. And especially does this [fol. 52] appear true when it is remembered that what is now being considered is the constitutionality of a condition upon a privilege, in a scheme for the packers' own benefit, one which appears to be about as practical and economical a scheme as can be devised.

And in the delegation to the department of power to make the election we find nothing contrary to the provisions of the constitution. It is inaccurate to regard the department

as being given power to fix the price; the price is to be the market price, fixed by the market; and if a packer of whom the money is demanded cannot agree on the market price he can be required to pay only that which shall be judicially ascertained as such, no price can be arbitrarily fixed for him. And for the choice between shells and money, there is little left to be settled by the department. It obtains nothing but shells and seed oysters in the end, and is only to determine where it is advantageous to obtain them for the needs to be met; the needs control the election; it would be wholly impracticable to settle by legislation the election required by the many and varied considerations which would enter into the work of planting about such great areas of bottom; and unless the election could be committed to the agency doing the work, the plan of election must be abandoned; and that we think the constitution does not require. The plan of obtaining shells at the localities near the planting is a reasonable and economic one, in the interest of the packers as well as of all others who deal in oysters, and without any substantial detriment to any of them. And the functions necessarily delegated to the department in charge of the work of planting is no more uncontrolled than those necessarily devolved upon other administrative agencies, and heretofore upheld by the courts. Tighe v. Osborne, 150 Md. 452, 560. Faust v. Building Assoc., 84 Md. 192. C. & P. Telephone Co. v. Board of Forestry, 125 Md. 666, 675.

The burden which might fall upon packers by requiring them to hold the shells on their premises until the department removes them seems to us an unsubstantial one, to be classed with those temporary burdens incidental to the individual's compliance with a lawful public demand, such [fols. 53 & 54] as the burden of preparing books or accounts for the assessment of taxes, entry of public officers upon private property for the purposes of preliminary surveys, seizure of milk and other merchandise for tests. State v. Mayhew, 2 Gill 487, 500. Steuart v. Baltimore, 7 Md. 500, 516. Lewis, Eminent Domain, sec. 228. The requirement would, in this aspect, seem analogous to one of the holding of garbage on private property for collection, which is sometimes a requirement against the interest of the owner of the premises. Gardner v. Michigan, 199 U. S.

325. And apart from these considerations this requirement also seems justified as a reasonable, or even necessary, part of a lawful condition attached to the privilege sought.

We conclude that there is no valid constitutional objection to the Act.

Order affirmed with costs to the appellee.

IN COURT OF APPEALS OF MARYLAND

JUDGMENT—April 19, 1928

Whereupon the following judgment of the Court was entered, to wit: "April 19th, 1928.—Order affirmed with costs to the appellee. Opinion filed. Opinion, Bond, C. J., to be reported.

[fol. 55] IN COURT OF APPEALS OF MARYLAND

[Title omitted]

PETITION FOR WRIT OF ERROR AND/OR PRAYER FOR APPEAL—Filed June 15, 1928

To the Honorable Carroll T. Bond, Chief Judge of the Court of Appeals of Maryland:

The petition of Ivy L. Leonard and Thomas B. Leonard, co-partners trading as I. L. Leonard & Company, appellants in the above entitled case, respectfully shows unto your honor:

1. That on the 19th day of April, 1928, a final judgment and decree was duly entered by the Court of Appeals of Maryland affirming the final order, judgment and decree entered by the Baltimore City Court in the matter of a proceeding wherein said Ivy L. Leonard and Thomas B. Leonard, co-partners trading as I. L. Leonard & Company, where the plaintiffs, and the said Swepson Earle, Conservation Commissioner of Maryland and Head of the Conservation Department of the State of Maryland, was defendant, which final order, judgment and decree of the

as being given power to fix the price; the price is to be the market price, fixed by the market; and if a packer of whom the money is demanded cannot agree on the market price he can be required to pay only that which shall be judicially ascertained as such, no price can be arbitrarily fixed for him. And for the choice between shells and money, there is little left to be settled by the department. It obtains nothing but shells and seed oysters in the end, and is only to determine where it is advantageous to obtain them for the needs to be met; the needs control the election; it would be wholly impracticable to settle by legislation the election required by the many and varied considerations which would enter into the work of planting about such great areas of bottom; and unless the election could be committed to the agency doing the work, the plan of election must be abandoned; and that we think the constitution does not require. The plan of obtaining shells at the localities near the planting is a reasonable and economic one, in the interest of the packers as well as of all others who deal in oysters, and without any substantial detriment to any of them. And the functions necessarily delegated to the department in charge of the work of planting is no more uncontrolled than those necessarily devolved upon other administrative agencies, and heretofore upheld by the courts. Tighe v. Osborne, 150 Md. 452, 560. Faust v. Building Assoc., 84 Md. 192. C. & P. Telephone Co. v. Board of Forestry, 125 Md. 666, 675.

The burden which might fall upon packers by requiring them to hold the shells on their premises until the department removes them seems to us an unsubstantial one, to be classed with those temporary burdens incidental to the individual's compliance with a lawful public demand, such [fols. 53 & 54] as the burden of preparing books or accounts for the assessment of taxes, entry of public officers upon private property for the purposes of preliminary surveys, seizure of milk and other merchandise for tests. State v. Mayhew, 2 Gill 487, 500. Steuart v. Baltimore, 7 Md. 500, 516. Lewis, Eminent Domain, sec. 228. The requirement would, in this aspect, seem analogous to one of the holding of garbage on private property for collection, which is sometimes a requirement against the interest of the owner of the premises. Gardner v. Michigan, 199 U. S.

325. And apart from these considerations this requirement also seems justified as a reasonable, or even necessary, part of a lawful condition attached to the privilege sought.

We conclude that there is no valid constitutional objection to the Act.

Order affirmed with costs to the appellee.

IN COURT OF APPEALS OF MARYLAND

JUDGMENT—April 19, 1928

Whereupon the following judgment of the Court was entered, to wit: "April 19th, 1928.—Order affirmed with costs to the appellee. Opinion filed. Opinion, Bond, C. J., to be reported.

[fol. 55] IN COURT OF APPEALS OF MARYLAND

[Title omitted]

PETITION FOR WRIT OF ERROR AND/OR PRAYER FOR APPEAL—Filed June 15, 1928

To the Honorable Carroll T. Bond, Chief Judge of the Court of Appeals of Maryland:

The petition of Ivy L. Leonard and Thomas B. Leonard, co-partners trading as I. L. Leonard & Company, appellants in the above entitled case, respectfully shows unto your honor:

1. That on the 19th day of April, 1928, a final judgment and decree was duly entered by the Court of Appeals of Maryland affirming the final order, judgment and decree entered by the Baltimore City Court in the matter of a proceeding wherein said Ivy L. Leonard and Thomas B. Leonard, co-partners trading as I. L. Leonard & Company, where the plaintiffs, and the said Swepson Earle, Conservation Commissioner of Maryland and Head of the Conservation Department of the State of Maryland, was defendant, which final order, judgment and decree of the

Baltimore City Court was rendered on the 22d day of December, 1927, dismissing the petition of the plaintiffs for a writ of mandamus directed to the defendant, commanding him to issue a license to appellants to pack oysters without any obligation or duty in the nature of a contract or otherwise to turn over to the State of Maryland any oyster shells or money in lieu of shells, and that the said license should be issued to the plaintiffs as formerly issued under Section 91 of Article 72 of the Code of Public General Laws of Maryland, 1924, except that the license be [fol. 56] issued by the Conservation Commissioner instead of the Clerk of the Court. That in the petition filed by said plaintiffs against the said Swepson Earle, Conservation Commissioner of Maryland and Head of the Conservation Department of the State of Maryland, it was alleged that the said plaintiffs were engaged in the business of packing oysters in the City of Cambridge, Dorchester County, Maryland, for several years before the filing of said petition, and that they desired and intended to pack oysters in said city, county and state during the oyster packing season beginning September 1, 1927, and ending the 25th day of April, 1928; that they own in fee simple a lot of land with buildings and improvements thereon, with proper equipment for packing oysters, located in said city, county and state, of the value of several thousand dollars; that in preparation for engaging in the packing of oysters from September 1, 1927, to April 25, 1928, the plaintiffs, on the 30th day of August, 1927, filed with the defendant an application for a license to pack oysters, your petitioners having but one place for said business, or having but one house in which they engaged in said business, which was the property hereinbefore mentioned, which application was accompanied by the check of the plaintiffs for Twenty-five dollars ($25) to pay for the said license, which said application, together with the said check, was refused by the defendant because the application was not in the form prescribed by the Conservation Department of Maryland, as set forth in a letter of the defendant refusing said application, filed as an exhibit with said petition.

2. That said application of plaintiffs was refused by the defendant upon the alleged ground that the license applied

for was not in accordance with the provisions of a certain alleged Act of the General Assembly of Maryland, namely, Chapter 119 of the Act of 1927, said Act purporting to provide as follows:

[fol. 57] "It shall be unlawful for any person, firm or corporation having a fixed place of business, buying oysters and employing labor to prepare them for market to engage in the business of buying, selling, marketing, packing or canning oysters without first taking out a license to engage in such business by application to the Conservation Department of Maryland. Where any such person, firm or corporation operates more than one house for the buying, selling, marketing, packing or canning of oysters, a separate license shall be obtained for each house in which oysters are shucked or otherwise prepared for market; such license to be in the nature and form of a contract between the State of Maryland and the applicant and shall provide for the payment of a license fee of twenty-five dollars, and shall further provide that the licensee must turn over to the State of Maryland at least ten per cent of the shells from the oysters shucked in his establishment for the current season, said shells to be removed on or before the twentieth day of August of said season; or at the discretion of the Conservation Department its equivalent in money, the value thereof being determined at the market value of shells as of the first day of May following the close of the season. The Conservation Department shall notify each packer or canner on or before the said first day of May whether it is its intention to take the ten per centum of the shells from oysters shucked as aforesaid, or its equivalent in money. Said license shall have effect from the first day of September in the year in which it may have been obtained until the twenty-fifth day of April, inclusive, next succeeding."

3. That it was further alleged by plaintiffs in said petition that during the packing seasons of 1925 and 1926 and 1926 and 1927 they had packed oysters not only from the natural oyster bottoms of the State of Maryland, but from the waters and oyster bottoms of other states, and that in addition to said oysters from other states than

Maryland the plaintiffs, during the said packing seasons, also packed oysters from leased bottoms in the State of Maryland.

4. It was further alleged in said petition that the quantity of oysters packed at the said plaintiffs' plant in the City of Cambridge as aforesaid, during the oyster seasons for preceding years was large, amounting in the season of 1925 to 52,714 bushels, and during the season of 1926 to 50,800 bushels; that the plaintiffs would suffer irreparable loss if they were denied a license to pack oysters in the State of Maryland.

[fol. 58] 5. It was expressly alleged and claimed in said petition that the said Act of 1927, Chapter 119, Section 1, repealing and re-enacting with amendments Section 91 of Article 72 of the Code of Public General Laws of Maryland hereinbefore set forth, was unconstitutional, null and void, in that the same was in violation of the Constitution of the United States, the said petition specifically alleging that insofar as the said Act of 1927, Chapter 119, purported to require that the license issued by the Conservation Department to any person, firm or corporation engaged in the business of buying, selling, marketing, packing or canning oysters, should be in the nature and form of a contract between the State of Maryland and the applicant, and should provide that the licensee must turn over to the State of Maryland at least ten per cent of the shells from the oysters shucked in his establishment for the current season, and that said licensee should store upon his premises or elsewhere until removed therefrom by the Conservation Department of Maryland on or before the 20th day of August of the season for which said license should be issued, amounted to the taking of private property for public use without making just compensation therefor, and accordingly the taking of property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States. It was also specifically alleged and claimed in said petition that the said Act of the General Assembly of Maryland of 1927, Chapter 119, was in violation of other provisions of the Constitution of the United States and of other provisions of the Fourteenth Amendment.

6. That to the said petition of the plaintiffs an answer was filed by the said defendant admitting certain allegations of the said petition and denying others, as will appear from the said answer filed in this proceeding. That to the said answer the plaintiffs filed a demurrer asserting that the same was not sufficient in law, and that nothing alleged [fol. 59] in said answer constituted a ground for denying the prayer of the petition filed by the plaintiffs. That the cause came on for hearing before the Honorable A. S. J. Owens, Judge of the Baltimore City Court, on October 26, 1927, and said court, as hereinbefore alleged, on the 22nd day of December, 1927, passed its final order overruling the demurrer of plaintiffs to said answer, and as plaintiffs elected to stand upon their demurrer to the said answer, further ordered that the said petition of plaintiffs be dismissed, with costs to the defendant. That on the 27th day of December, 1927, the plaintiffs filed an order for appeal to this court from said final order and judgment of the Baltimore City Court. That after hearing in the Court of Appeals of Maryland the said court, on the 19th day of April, 1928, filed its opinion affirming the judgment of the Baltimore City Court, and entered its order and judgment to that effect on the same day. That both in the Baltimore City Court and in the Court of Appeals of Maryland the claim and contention was specifically made that the said alleged Act of the General Assembly of Maryland of 1927, Chapter 119, Section 1, was in violation of the Constitution of the United States, and particularly of the provisions thereof hereinbefore referred to, and expressly mentioned in the petition of plaintiffs.

7. That in the aforesaid judgment and order of the Court of Appeals of Maryland certain errors were committed to the prejudice of your petitioners, all of which will more fully appear from the Assignment of Errors which is filed herewith, but particularly in that said court held the said Act of the General Assembly of Maryland of 1927, Chapter 119, Section 1, to be valid and not in conflict with the Constitution of the United States.

Wherefore your petitioners pray that the writ of error from the Supreme Court of the United States may issue in this case to the Court of Appeals of Maryland, the highest

court of the State of Maryland, wherein a decision in this [fol. 60] case may be had for the correction of errors so complained of, and that your petitioners may be granted the right of appeal to the Supreme Court of the United States, for which they expressly hereby pray (in case such prayer for appeal or such appeal may be the necessary proceeding), and that a transcript of the record, proceedings and papers in this cause, duly authenticated by the clerk of the Court of Appeals of Maryland, may be sent to the Supreme Court of the United States as provided by rule.

William L. Rawls, V. Calvin Trice, Attorneys for Petitioners and Plaintiffs in Error.

Dated the 15th day of June, 1928.

[fol. 61] In the Court of Appeals of Maryland

[Title omitted]

Assignment of Errors—Filed June 15, 1928

Now come Ivy L. Leonard and Thomas B. Leonard, copartners trading as I. L. Leonard and Company, petitioners and plaintiffs in error, by V. Calvin Trice and William L. Rawls, their attorneys, and show that in the record and proceeding and in the rendering of the judgment and decision of the Court of Appeals of Maryland, being the highest court in the State of Mrayland in which a decision could be had in the above entitled cause, manifest error has intervened to the prejudice of these petitioners and plaintiffs in error in the particulars following, to wit:

1. The Court of Appeals of Maryland erred in affirming by its order and judgment the action of the Baltimore City Court in overruling the demurrer filed by plaintiffs in error to the answer of the defendant and in dismissing the petition of the petitioner and plaintiff in error.

2. That the Court of Appeals of Maryland erred in deciding by its final order and judgment in this case that Section 1 of Chapter 119 of the Acts of the General Assembly of Maryland of 1927 was a valid law and was not in conflict with the Constitution of the United States.

3. That the Court of Appeals of Maryland erred in de-
[fol. 62] ciding that the said Chapter 119, Section 1 of the Acts of the General Assembly of Maryland of 1927 did not authorize the taking of property without due process of law contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

4. That the Court of Appeals of Maryland erred in deciding by its final order and judgment that the taking of oyster shells from those engaged in the packing of oysters in the State of Maryland, regardless of whether or not said shells were from oysters taken from the waters of the State, did not amount to the taking of private property for public use without making just compensation therefor and without due process of law as required by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

5. That the Court of Appeals of Maryland erred in deciding that the said Chapter 119, Section 1 of the Acts of the General Assembly of Maryland of 1927 was valid although authorizing the taking of oyster shells from the plaintiffs in error when such shells came from oysters brought into Maryland from other states by the petitioners or by those from whom they purchased them.

6. That the Court of Appeals of Maryland erred in deciding that the said Chapter 119, Section 1 of the Acts of the General Assembly of Maryland of 1927 was valid even though it authorized the taking of oyster shells from petitioners by the defendant in error, which said shells came from oysters taken upon leased beds of the State, title to which oysters had been surrendered by the State under leasing agreements with private parties.

7. That the Court of Appeals of Maryland erred in deciding by its final judgment and order in this case that the said Chapter 119, Section 1 of the Acts of the General Assembly of Maryland of 1927 did not constitute a denial to the petitioners of the equal protection of the laws of the State of Maryland contrary to the provision of Section 1 of
[fol. 63] the Fourteenth Amendment to the Constitution of the United States.

8. That the Court of Appeals of Maryland erred in deciding that the giving of the option to the defendant by said Chapter 119, Section 1 of the Acts of the General Assembly of Maryland of 1927 to determine whether or not he would accept shells or the equivalent of shells in the payment of the exaction imposed by said act was a denial of the equal protection of the laws of the State of Maryland and of due process of law contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

9. That the Court of Appeals of Maryland erred in deciding that the said act was valid although it required petitioners to store upon their premises for a period of three months and twenty days the shells which the defendant should determine to take.

10. That the Court of Appeals of Maryland erred in deciding that said Chapter 119, Section 1 of the Acts of the General Assembly of Maryland of 1927 did not violate the Constitution of the United States even though petitioners and others engaged in the business of packing oysters were subjected to a form and method of exaction imposed upon no other persons in the State of Maryland.

11. That the Court of Appeals of Maryland erred in deciding that the form exaction imposed by said Chapter 119, Section 1 of the Acts of the General Assembly of Maryland of 1927 was justified under the taxing power of the State and did not amount to the taking of property for public use without just compensation being made to the owner as required by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

[fol. 64] Prayer for Reversal

For which errors the plaintiff prays that the said order and judgment of the Court of Appeals of the State of Maryland, dated April 19th, 1928, in the above entitled cause, be reversed and a judgment rendered in favor of said plaintiff and for costs.

William L. Rawls, V. Calvin Trice, Counsel for Plaintiffs in Error.

[fol. 65] IN THE COURT OF APPEALS OF MARYLAND

[Title omitted]

ORDER ALLOWING WRIT OF ERROR AND/OR APPEAL—Filed June 15, 1928

On reading of the petition of Ivy L. Leonard and Thomas B. Leonard, co-partners trading as I. L. Leonard & Company, for a writ of error and or appeal, and the assignment of errors, and upon due consideration of the record of said cause, it is ordered that a writ of error be allowed from the Supreme Court of the United States to the Court of Appeals of Maryland, the highest court of the State of Maryland in which a decision can be had as prayed in said petition, and that the prayer of said petitioners for an appeal to the Supreme Court of the United States be and the same is hereby granted, and that said writ of error and/or appeal and citation thereon be issued, served and returned to the Supreme Court of the United States in accordance with law, upon condition that the said petitioners and plaintiffs in error do give security in the sum of Five hundred dollars ($500.00), that said plaintiffs in error and/or appellants shall prosecute said writ of error and or appeal to effect, and if said plaintiffs in error or appellants fail to make their plea good, shall answer to the defendant in error or appellee for all costs and damages that may be adjudged or decreed on account of said writ of error — or appeal, and the said plaintiffs in error or appellants now presenting a bond in the sum of Five hundred dollars ($500) with [fol. 66 & 67] the United States Fidelity & Guaranty Company, as surety, it is ordered that the same be and it hereby is duly approved.

In witness whereof I have hereunto set my hand this 15th day of June, 1928.

Carroll T. Bond, Chief Judge of the Court of Appeals of Maryland, the Highest Court of the State of Maryland.

Filed June 15th, 1928.

[fol. 68] Bond on writ of error and/or appeal for $500, approved and filed June 15, 1928, omitted in printing.

[fol. 69] IN COURT OF APPEALS OF MARYLAND

WRIT OF ERROR—Filed June 15, 1928

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of Maryland, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said Court of Appeals of the State of Maryland, before you or some of you, being the highest Court of Law or Equity of the said State in which a decision could be had in the said suit between Ivy L. Leonard and Thomas B. Leonard, co-partners trading as I. L. Leonard & Company, Appellants, and Swepson Earle, Conservation Commissioner of Maryland and Head of the Conservation Department of the State of Maryland, Appellee, wherein was drawn in question the validity of a statute of the State of Maryland on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of its validity, it appears that said Ivy L. Leonard and Thomas B. Leonard, co-partners trading as I. L. Leonard & Company are entitled to have the said judgment reviewed by the Supreme Court of the United States and they having presented a petition for a Writ of Error and Assignment of Errors to that end;

And we being willing that error, if any hath occurred, should be duly corrected and full and speedy justice done to the parties aforesaid, do command you, that under your seal, distinctly and openly, you send the record, proceedings and judgment aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, and that you have the same in the said Supreme Court of Washington within thirty days from the date hereof so that the said Supreme Court may examine and consider the same and may cause further to be done to

[fol. 70] correct the error therein, if any hath occurred, as of right and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 15th day of June, in the year of our Lord, one thousand nine hundred and twenty-eight.

Arthur L. Spamer, Clerk District Court of the United States for the District of Maryland. (Seal United States District Court, Maryland.)

Allowed this 15 day of June, 1928. Carroll T. Bond, Chief Judge of the Court of Appeals of Maryland.

[fols. 71 & 72] [File endorsement omitted.]

[fols. 73 & 74] Citation, in usual form, showing service on Thos. H. Robinson, filed June 15, 1928, omitted in printing.

[fol. 75] In Court of Appeals of Maryland

[Title omitted]

In the Court of Appeals of Maryland

Stipulation for Transcript of Record—Filed June 15 1928

It is agreed between counsel for the respective parties in this case that the record to be transmitted to the Supreme Court shall contain an entire record of the proceedings in the case in the Baltimore City Court and in the Court of Appeals of Maryland, that is to say, the record shall embrace the petition filed by plaintiffs for the writ of mandamus in the Baltimore City Court, together with the exhibits and affidavit filed therewith, order of Baltimore City Court, dated September 28, 1927, the docket entries of the Baltimore City Court, combined demurrer and answer of

the defendant, Swepson Earle, Conservation Commissioner, with affidavit thereto, demurrer of plaintiff to answer of defendant, other docket entries and record of proceedings in the Baltimore City Court, as set forth in the transcript of the record sent to the Court of Appeals, the opinion of the Honorable A. S. J. Owens, Judge of the Baltimore City Court, final order of the Baltimore City Court, dated December 22, 1927, order of appeal on the part of the plaintiff and affidavit thereto, certification of record by the clerk of the Baltimore City Court, opinion of the Court of Appeals and final order and decree of said court in pursuance of said opinion, appellants' petition for writ of error and/or appeal, assignments of error with order allowing said writ [fol. 76] of error and/or appeal, bond given by plaintiff in error, writ of error, citation to defendants in error with service thereon.

William L. Rawls, V. Calvin Trice, Counsel for Plaintiffs in Error. Thos. H. Robinson, Atty. Gen. of Md., Robert H. Archer, Asst. Atty. Gen. of Md., Counsel for Defendant in Error.

[fol. 77] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 78 & 79] In the Supreme Court of the United States

Statement by Plaintiffs in Error of Points to be Relied Upon and Designation to Print Entire Record—Filed July 12, 1928

Plaintiffs in error in the above entitled proceeding intend to rely therein on each point set forth in their assignment of errors herein, and they herewith specify the entire record herein as necessary for the consideration of said points.

William L. Rawls, Counsel for Plaintiffs in Error.

Plaintiffs in error having specified the entire record as necessary in their opinion for the consideration of the points on which they intend to rely, defendant in error

hereby consents that the Clerk of the Supreme Court of the United States may proceed at once with the printing of the said record accordingly.

Thos. H. Robinson, Attorney General of Maryland,
Counsel for Defendant in Error.

Endorsed on cover: File No. 33,569. Maryland Court of Appeals. Term No. 260. Ivy L. Leonard and Thomas B. Leonard, co-partners, trading as I. L. Leonard & Company, plaintiffs in error and appellants, vs. Swepson Earle, Conservation Commissioner of Maryland and Head of the Conservation Department of the State of Maryland. Filed July 9th, 1928. File No. 33,569.